**Qualifying long term management agreements**

The RICS Code of Practice recommends that managing agents and their clients should enter into written contracts detailing duties and the basis of fee charging. It is clearly in a managing agent's interest to negotiate lengthy management agreements to protect their position and retain longer term business certainty. The extension of Section 20 to include qualifying long term agreements (QLTAs) entered into after 31st October 2003 made this much more problematic for managing agents.

Under Section 20 ZA(2) of the Landlord & Tenant Act 1985 and The Service Charges (Consultation Requirements) (England) Regulations 2003 landlords must now consult leaseholders before entering into contracts for more than 12 months under which relevant costs incurred in respect of any accounting period (in principle one year) exceed an amount which results in the relevant contribution of any tenant being more than £100 in respect of that period.

The 'Regulations' do not prevent landlords tendering longer term management agreements and there is potentially some merit in landlords doing so. Managing agents are, however, reluctant to suggest such a course of action to their potential clients due to the risk of not being the successful bidder. There is, unsurprisingly, even greater reluctance to recommend such a course of action to existing clients when current contracts come up for renewal. Additional difficulties present themselves here in that the current agent is not in a position to undertake the consultation or tendering process on their clients' behalf whilst wishing to tender for the on-going business themselves.

Since October 2003, therefore, it has become increasingly common for managing agents to enter into management agreements for no more than 12 months, typically with an annual renewal. Such contracts; for no more than 12 months, renewed annually are clearly not qualifying long term agreements.

Many managing agents are reluctant, however, to renew their contracts annually; preferring not to alert their clients to the possibility of changing agents or negotiating more beneficial terms. This has led to a proliferation of 'rolling management agreements'. I am frequently asked for my reassurance that such contracts are not caught by the Regulations.

There has been a surprising lack of case law surrounding qualifying long term agreements and hence one must urge caution to any landlord entering into such contracts.

The one case in which this issue was considered was *Paddington Walk Management Ltd v Governors of Peabody Trust* heard by Her Honour Judge Marshall QC in the Central London County Court in April 2009 (Case No: CHY08440). As this was a County Court decision it does not carry any weight as a precedent and we still await similar decisions being appealed to a higher court to proffer any certainty for the future. The standing of HH Judge Marshall, however, has given this decision credence and it has been quoted within a number of subsequent LVT determinations.
The agreement referred to in this case was entered into on 1 June 2006:

“for an initial period of one year from 1 June 2006 and will continue on a year-to-year basis with the right to termination by either party on giving three months’ written notice at any time”.

In determining that:

“an agreement for a year certain and then from year to year to continue subject to not being terminated is not “an agreement for a term of more than 12 months”” HH Judge Marshall firstly expressed her surprise that she could not find any relevant authority and secondly made the statement that she reached this conclusion “with a little hesitation”.

It is important to consider the exact wording of the agreement in question when trying to extrapolate this decision to cover other agreements with different wording. This agreement specifically stated that it would be for an initial period of one year, would continue on a year-to-year basis and contained the ability for three months notice to be given at any time.

In contrast to these words, a number of management agreements have come to my attention recently which, whilst seeking to replicate similar contractual terms, offer real concern that they may not be interpreted similarly by the courts or tribunals.

Two such agreements contain the following clauses:

A. ... the appointment shall be for one year from the date xx is instructed by the client to commence providing its services hereunder and thereafter may be terminated by either party giving to the other three months notice in writing...

B. ...this agreement shall commence on the date of this Agreement and shall terminate upon three months’ notice in writing by either party to the other provided that such notice may not be served before the expiry of one year less one day from the date of this Agreement.

In comparing the wording of these agreements to that in the Paddington Walk case I am drawn to note when notice of termination may be served and hence when the agreement may be terminated in order to consider the effective minimum term. In the Paddington Walk case notice could clearly be given at any time. In agreement A the determinative word appears to be thereafter, i.e. notice can only be given after the end of the one year initial term; producing an agreement with a minimum term of fifteen months.

Agreement B goes to some lengths to try and ensure it cannot be interpreted as an agreement for more than a year by limiting not only to a year but to one year less one day. All it succeeds in doing, however, is providing for the earliest date that three
months notice may be served i.e. *not before the expiry of one year less one day*, producing an agreement with a minimum term of fifteen months less one day.

Whether these agreements are subsequently rolling three month contracts or not becomes irrelevant if they are caught by the requirements of Section 20ZA by reason of their initial term being longer than 12 months.

Failure to consult in respect of a QLTA limits a tenant's relevant contribution, under Section 20(7), to £100 per service charge year. There are various schools of thought about whether the Limitation Act 1980 imposes any time limit on retrospective applications from leaseholders relating to their liability for relevant costs in past years. Even in the best case scenario, however, landlords could be faced with applications going back 6 years, possibly for 12 years and potentially unlimited.

The risk of an on-going management agreement being determined as a QLTA could, therefore, be catastrophic for the landlord; especially a residents' management company with no assets or income of their own. If the management agreement has been proffered by the managing agent to the client and without advice to follow the statutory consultation procedures it is highly likely that the agent will face pressure (or legal action) to make good the landlord’s losses.

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